

## **PRE-AWARD WAIVER, RELEASE, AND LIMITATION OF LIABILITY AGREEMENT (TIMBER SALE)**

This PRE-AWARD WAIVER, RELEASE, AND LIMITATION OF LIABILITY AGREEMENT ("Agreement") is entered into as of this \_\_\_\_ day of September, 2011 between the U.S. Forest Service ("Forest Service") and \_\_\_\_\_ ("Purchaser") (together sometimes referred to herein as the "Parties").

### **RECITALS**

WHEREAS, on or about \_\_\_\_\_, the Forest Service declared Purchaser to be the apparent high-bidder on the contract to operate the Fern Hardy Timber Sale, located on Idaho Panhandle National Forest;

WHEREAS, the Parties recognize that the Fern Hardy Timber Sale may be affected by existing and/or threatened litigation ("Litigation") and that, due to such Litigation, the Contracting Officer may instruct Purchaser to delay or interrupt operations, and/or modify or terminate the contract for the Fern Hardy Timber Sale; and

WHEREAS, Purchaser desires the Forest Service to proceed with the award of the contract, despite the possibility that the Forest Service might delay or interrupt operations, and/or modify or terminate the contract;

NOW THEREFORE, the Parties agree as follows:

### **TERMS AND CONDITIONS**

1. **Contract Award.** After the Parties' execution of this Agreement, the Contracting Officer shall promptly award the contract for the Fern Hardy Timber Sale to Purchaser, if Purchaser has met all the eligibility requirements for contract award.
2. **Release of Claims.** Except as provided in Paragraph Three, Purchaser agrees to waive and release any and all claims against the Forest Service, Department of Agriculture, and/or United States (collectively the "Government") based in whole or in part upon any instruction issued by the Contracting Officer to delay or suspend operations, and/or modify or terminate the contract for the Fern Hardy Timber Sale because of Litigation. Purchaser agrees that the foregoing waiver and release includes, but is not limited to, any claim based in whole or in part upon (a) any finding that the Forest Service failed to comply with environmental laws, regulations, rules, and/or policy; (b) any express or implied contractual warranty regarding the availability of timber for harvest; or (c) any express or implied contractual duty to cooperate and not to hinder Purchaser's performance.
3. **Purchaser's Remedies.** Purchaser acknowledges and accepts the risk that this contract is subject to interruption, delay, modification and/or termination as a result of this or any other litigation. If such interruption occurs due to the litigation, Purchaser acknowledges and agrees to accept as full compensation for such interruption, the remedies described in Standard Provision B8.33 (b) (i), (ii), (iv), and (vi). If termination or partial termination occurs due to the litigation, Purchaser acknowledges and agrees to accept as full compensation for such termination or partial termination, the reimbursement of Out-Of-Pocket Expenses as defined in Standard Provision B8.35 Out-of-Pocket Expenses.
4. **Limitation of Liability.** In the event that the Contracting Officer instructs Purchaser to delay or interrupt operations, and/or modify or terminate the contract because of Litigation, Purchaser shall not be entitled to any kind of breach damages, reliance damages, restitution damages, consequential damages, or special damages, except as specifically allowed in the contract. Moreover, Purchaser shall not be entitled to the following contract remedies set forth in Standard Provisions B8.341 and B8.342: 1) replacement volume, and 2) liquidated damages.

5. **Merger.** Upon the Parties' execution of the contract for the Fern Hardy Timber Sale, this Agreement shall become part of such contract as an addendum thereto. Should there be a conflict between the terms of this Agreement and the terms of the original contract, the terms of this Agreement shall govern. The Parties' subsequent execution of the contract for the Fern Hardy Timber Sale shall not in any way affect the waiver, release, and limitation of liability, contained herein. Should Purchaser assign or otherwise transfer contract-performance duties to a third-party, this Agreement shall be binding on the subsequent contract holder and/or operator.
6. **Purchaser's Affirmation.** By executing this Agreement, Purchaser affirms that it has freely and knowingly agreed to the foregoing waiver, release, and limitation of liability. Moreover, Purchaser affirms that the timber sale contract award by the Forest Service, which might have been delayed or withheld, constitutes adequate consideration for the foregoing waiver, release, and limitation of liability.
7. **Choice of Law.** This agreement shall be governed by the laws of the United States and federal common law without regard to conflicts of laws.
8. **Severability.** In the event that a tribunal of competent jurisdiction invalidates any part of this Agreement, the Parties agree that such part shall be severed and that the remaining parts shall continue in full force and effect.
9. **Jurisdiction.** The Parties expressly agree that the United States Court of Federal Claims and the U.S. Civilian Board of Contract Appeals shall have jurisdiction over this Agreement and hereby consent to the jurisdiction of such bodies. The foregoing agreement and consent shall not be construed to interfere with or defeat the proper jurisdiction of other courts.

IN WITNESS WHEREOF, the Parties hereto have executed this agreement.

**USDA, Forest Service:**

**Purchaser:**

By:

By:

Title: Contracting Officer

Title:

I, \_\_\_\_\_, certify that I have full authority to represent the interests of  
\_\_\_\_[Purchaser]\_\_\_\_, and that my signature above binds \_\_\_\_[Purchaser]\_\_\_\_ to this agreement.

\_\_\_\_\_  
Corporate Seal  
(If one exists)